STATE OF MICHIGAN

COURT OF APPEALS

MUSTAFA MISSILMANI, FATME MISSILMANI and M&A PETROLEUM, INC.,

Plaintiffs-Appellees,

v

CITY OF DETROIT and CITY OF DETROIT WATER & SEWERAGE DEPARTMENT,

Defendants-Appellants.

UNPUBLISHED
April 23, 2002

No. 227784
Wayne Circuit Court
LC No. 98-806573-CK

Before: Bandstra, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order of judgment for plaintiffs awarding them a $1,233,650.87 jury verdict, along with various costs and interest. We affirm.

This case involves a breach of contract action and is on appeal from the second trial in the matter. This Court reversed the judgment for plaintiffs in the first trial. *Missilmani v City of Detroit,* unpublished opinion per curiam of the Court of Appeals, issued November 22, 1996 (Docket No. 178675) (*Missilimani I*).

Defendants first argue that the trial court violated the law of the case doctrine by admitting testimony concerning the parties' negotiations for interim business interruption payments. "The law of the case doctrine provides that a ruling by an appellate court with regard to a particular issue binds the appellate court and all lower tribunals with respect to that issue." *Driver v Hanley (After Remand),* 226 Mich App 558, 565; 575 NW2d 31 (1997). Accordingly, "a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case." *Id.* The primary purpose of the doctrine "is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Ashker v Ford Motor Co,* 245 Mich App 9, 13; 627 NW2d 1 (2001). The doctrine applies only to questions actually determined by the earlier decision and to those questions necessary to the court's earlier decision. *City of Kalamazoo v Corrections Dep't (After Remand),* 229 Mich App 132, 135; 580 NW2d 475 (1998). "Whether law of the case applies is a question of law subject to review de novo." *Ashker*, *supra* at 13.

Defendants maintain that in *Missilimani I,* this Court ruled that evidence of negotiations between these parties concerning quarterly payments was not admissible, when it stated:

> Plaintiffs produced evidence at trial indicating that the parties considered quarterly business disruption compensation payments during the construction period but never executed an agreement making such an arrangement. We understand plaintiffs' position that they needed interim business disruption compensation payments to sustain the station during the construction period, but that is not the deal plaintiffs struck. According to the unambiguous terms of the stipulation, defendants were not obligated to compensate plaintiffs for any business disruption until a reasonable time *after* completion of the project. At the time plaintiffs filed the present action, the construction project was not complete. . . . Accordingly, as a matter of law, defendants could not have breached the business disruption compensation terms of the contract *as of [the] time plaintiffs filed the complaint*. [*Missilmani I, supra* at 2 (emphasis added).]

We conclude that in *Missilimani I*, this Court was not establishing the law of the case with regard to the admissibility of evidence, i.e., this Court did not determine that the evidence was inadmissible, nor was it necessary to rule on the admissibility of the evidence to reach its decision. Rather, this Court was simply explaining why plaintiffs' suit was premature at that point and had to be dismissed. Accordingly, the trial court in this case did not violate the law of the case by admitting evidence regarding negotiations for quarterly payments.

Defendants further contend that even if admission of the challenged evidence did not violate the law of the case doctrine, the trial court abused its discretion in admitting the evidence because extrinsic evidence to vary the terms of an unambiguous contract is inadmissible. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998).

Defendants appear to argue that the challenged evidence was barred by the parol evidence rule:

> Parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous. A prerequisite to the application of this rule, however, is a finding that the parties intended the written instrument to be a complete expression of their agreement. Thus, extrinsic evidence of prior or contemporaneous agreements or negotiations is admissible as it bears on the threshold question of whether the written instrument is such an integrated instrument. [*Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 580; 458 NW2d 659 (1990) (citations omitted).]

However, in this case, the majority of the discussions concerning interim payments were not prior or contemporaneous, but were subsequent to the stipulation. Further, the stipulation signed by both parties clearly was not a complete integration. The final paragraph states: "this Stipulation will be used as the basis for the preparation of a formal agreement and will be submitted to the Board of Water Commissioners as evidence of the concurrence of the undersigned in the stated terms and conditions." Accordingly, the parol evidence rule does not apply in this instance.

In any event, plaintiffs did not offer the testimony regarding quarterly payments to show that they were entitled to such payments, i.e., it was not offered to vary the terms of the contract. Rather, plaintiffs argued that the testimony was relevant to show the intent of the parties with regard to negotiating compensation for any business disruption losses. Contrary to defendants' assertion, this Court did not hold in its earlier opinion that the parties' entire contract was unambiguous. Rather, this Court determined that the terms regarding *when* defendants were obligated to compensate plaintiffs for business disruption losses were unambiguous. *Missilmani I, supra* at 2. As defendants themselves argued in their response to plaintiffs' motion for partial summary disposition, the term "business disruption" is not defined in the parties' stipulation and is open to interpretation. Because the contract phrases "compensation for business disruption," and "negotiated and offered" are not clear and unambiguous, the intent of the parties with regard to those terms was for the jury to determine. *UAW-GM Human Resource Center v KSL Recreation Corp,* 228 Mich App 486, 492; 579 NW2d 411 (1998). The testimony concerning interim payments was relevant to that determination. MRE 401; *Tobin v Providence Hosp,* 244 Mich App 626, 637; 624 NW2d 548 (2001). Further, because plaintiffs did not argue that they were entitled to interim payments, or that the damages claimed were for failure to make interim payments, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or waste of time. MRE 403; *Roulston v Tendercare (Michigan), Inc,* 239 Mich App 270, 282-283; 608 NW2d 525 (2000).

We conclude, therefore, that the trial court did not violate the law of the case doctrine or otherwise abuse its discretion by admitting evidence regarding negotiations for quarterly payments.[1]

Defendants next argue that the trial court gave improper and prejudicial jury instructions. A party must object to jury instructions on the record before the jury retires to deliberate, stating specifically the matter to which the party objects and the ground upon which it objects. MCR 2.516(C). If a party fails to do so, it has waived appellate review. *Leavitt v Monaco Coach Corp,* 241 Mich App 288, 300; 616 NW2d 175 (2000).

Although defendants raised this issue in their motion for new trial, they did not object to the jury instructions on the record at trial, and when they raised the issue in their motion for new trial, they did not argue the same grounds for error that they argue on appeal. At trial, when the court expressly asked if the parties had any additions or corrections to the jury instructions it gave, defendants made three specific objections, none of which addressed the instructions now challenged on appeal. The court addressed defendants' objections, and then asked if there was anything else. Both parties responded that there was not. Because defendants expressed satisfaction with the balance of the instructions, they have waived this issue for appeal. *Id.*; see

[1] With regard to defendants' conclusory statement that the trial court erred in denying their motion for a directed verdict, defendants have not stated that issue in their questions presented, nor have they briefed the issue. Accordingly, this Court need not address it. *Silver Creek Twp v Corso,* 246 Mich App 94, 99; 631 NW2d 346 (2001); *Caldwell v Chapman,* 240 Mich App 124, 132; 610 NW2d 264 (2000). In any event, our review of the record shows that reasonable minds could differ with regard to whether plaintiffs' met their burden of proof. Accordingly, the trial court properly denied defendants' motion for a directed verdict. *Head v Phillips Camper Sales & Rental, Inc,* 234 Mich App 94, 109; 593 Mich NW2d 595 (1999).

also *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Tate*, 244 Mich App 553, 558-559; 624 NW2d 524 (2001). In any event, our review of the challenged instructions reveals that no manifest injustice occurred. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 403; 628 NW2d 86 (2001); *Phinney v Perlmutter*, 222 Mich App 513, 556-557; 564 NW2d 532 (1997).

Affirmed.

/s/ Richard A. Bandstra
/s/ Michael R. Smolenski
/s/ Patrick M. Meter